

**IN THE UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF WEST VIRGINIA  
AT HUNTINGTON**

CARLTON & HARRIS CHIROPRACTIC,	)	
INC., individually and as the representative	)	
of a class of similarly-situated persons,	)	
	)	
Plaintiff,	)	Case No. 3:15-cv-14887 (RCC)
	)	
v.	)	
	)	
PDR NETWORK, LLC, PDR	)	
DISTRIBUTION, LLC, PDR EQUITY,	)	
LLC and JOHN DOES 1-10,	)	
	)	
Defendants.	)	

**PLAINTIFF’S SUPPLEMENTAL RESPONSE BRIEF REGARDING *PULSE8*  
IN OPPOSITION TO DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT**

Pursuant to the Court’s Order (Doc. 133), Plaintiff, Carlton & Harris Chiropractic, Inc., states as follows regarding the Fourth Circuit’s decision in *Family Health Physical Medicine, LLC v. Pulse8, LLC*, 105 F.4th 567 (4th Cir. 2024) (“*Pulse8*”), and in response to the Supplemental Brief filed by Defendants, PDR Network, LLC, PDR Distribution, LLC, and PDR Equity, LLC (“Defendants” or “PDR”) (Doc. 136). As argued below, *Pulse8* only confirms that PDR’s Motion for Summary Judgment (Doc. 129) should be denied.

In *Pulse8*, the defendant argued that “a fax which offers something for free is commercial *only* if there is a ‘direct mechanism by which the sender will profit if the offer is accepted,’” under the Fourth Circuit’s most recent opinion in this case, *Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC*, 80 F.4th 466, 474 (4th Cir. 2023) (“*PDR Network VI*”). *Pulse8*, 105 F.4th at 571 (quoting *Pulse8* Suppl. Br. at 1). The Fourth Circuit rejected that interpretation of *PDR Network VI*, holding there is no requirement that there be a “direct mechanism” by which the sender will profit if the recipient accepts the free good or service, and

reiterating that to qualify as an “advertisement” under the TCPA, there need only be some “‘commercial nexus’ between the fax and ‘the sender’s business—its property, products, or services.’” *Id.* (quoting *PDR Network VI*, 80 F.4th at 474). The Fourth Circuit discussed the free-seminar fax in *Physicians Healthsource, Inc. v. Boehringer Ingelheim Pharms., Inc.*, 847 F.3d 92 (2d Cir. 2017), as a “prototypical . . . example” of a fax that does *not* supply a “direct mechanism” by which the sender would profit if the offer is accepted, but is nevertheless an “advertisement” because the required “nexus” existed between the fax and the defendant’s business. *Pulse8*, 105 F.4th at 571.

In this case, PDR’s bid for summary judgment is based on the same argument that the Fourth Circuit rejected in *Pulse8*: the assertion that the Fax in this case cannot be an advertisement unless there is a “direct profit” to PDR when a fax recipient accepts a free eBook. (Doc. 136, PDR Supp. Br. at 3, n.3). PDR’s Supplemental Brief, like its earlier summary-judgment briefs, purports to quote *PDR Network VI*, 80 F.4th at 477, for this supposed “direct profit” language. (*Id.*; see also Doc. 127, PDR Mem. Supp. Mot. Summ. J. at 13 (arguing there is a “direct profit” requirement, quoting *PDR Network VI*, 80 F.4th at 477); Doc. 129, PDR Reply Supp. Mot. Summ. J. at 8 (same)).

The phrase “direct profit” does not appear in *PDR Network VI* at the page cited by PDR, 80 F.4th at 477. The phrase “direct profit” does not appear anywhere in the opinion. See *id.* at 466–479. That makes sense because *PDR Network VI* says the opposite of what Defendants claim: it holds that “advertise” is commonly understood to mean that the speaker “hopes to make a profit, directly *or indirectly*.” *PDR Network VI*, 80 F.4th at 473 (emphasis added).

Applying the “commercial nexus” test required by *Pulse8* and *PDR Network VI*—rather than Defendants’ unsupported “direct profit” test—Defendants’ motion for summary judgment

must fail. The record in this case reveals a “commercial nexus” between the Fax and Defendants’ business that is stronger than the nexus in *Pulse8* or in *Boehringer*. Part of Defendants’ business model is to “distribute” the *Physicians Desk Reference*, including the 2014 eBook, given that the pharmaceutical companies are not simply “paying to have their drugs listed in the PDR,” but are also paying PDR “to put the Physicians’ Desk Reference in the hands of healthcare providers.” (Doc. 126-2, Deposition of B. Senich (“Senich Dep.”) at 39:11–13; *id.* at 39:15 (“Yes.”); *see also id.* at 38:16)). In contrast, the defendant in *Pulse8* was not in the business of putting on free webinars regarding behavioral health coding, *Pulse8*, 105 F.4th at 572, just as the defendant in *Boehringer* was not in the business of putting on free seminars regarding pharmaceutical drugs, *Boehringer*, 847 F.3d at 97. Here, PDR is in the business, in part, of distributing the eBook to fax recipients like Plaintiff. That “commercial nexus” demonstrates that the Fax is an “advertisement” under *Pulse8* and *PDR Network VI*. At the very least, PDR is not entitled to summary judgment on that issue.

### **Conclusion**

The Court should deny Defendants’ Motion for Summary Judgment and grant any other relief the Court deems appropriate.

Respectfully submitted,

CARLTON & HARRIS CHIROPRACTIC, INC.  
individually and as the representative of a class of  
similarly-situated persons,

s/ Glenn L. Hara

Glenn L. Hara – *Pro hac vice admitted*

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**CERTIFICATE OF SERVICE**

I hereby certify that on September 27, 2024, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all attorneys of record.

s/ Glenn L. Hara  
Glenn L. Hara